THE PROTECTION OF ALIENS BY THE UNITED STATES.

EVERY country owes a duty of protection to aliens who are lawfully within its territory. "An alien friend, however transient his presence may be, is entitled to a temporary protection, and owes in return a temporary allegiance."[1]

This duty, as respects a foreigner in any particular State of the Union, is shared between the State and the United States. Primarily it rests upon the State, but should the State, in case of any injury to him, neglect its performance, the government to which he belongs has a right to complain to the United States and to ask reparation from them.

Such reparation, if not accorded by the President through diplomatic negotiation and executive orders, can be granted in three ways: by a Congressional appropriation of money; by a Congressional appropriation of money by which a fund is placed in the hands of the Executive department to be used at its discretion to promote friendly relations with foreign countries; or by Congressional legislation giving a remedy in the courts.

Such a judicial remedy might be by an action to be brought by the injured party to recover compensation from the United States; or, in proper cases, by writ of injunction or mandamus, in the name of the United States suing for the benefit of the party injured. Jurisdiction over such actions could be given by Act of Congress either to the Courts of the United States or of the State, or to both.[2]

If given to the State courts, and a judgment were rendered adverse to the claim set up by the plaintiff under the Constitution or laws of the United States, a right of review would exist under the JUDICIAL CODE, § 237.

A further remedy might probably be given of a more general character. Why could not the United States be given by Act of Congress power to attack the constitutionality of a State statute, which deprives an alien of any right or privilege, directly in the courts of that State, on the ground that it is inconsistent with the Constitution, laws and treaties of the United States? Why, for instance, could not such a mode of proceeding be authorized to settle the question raised by the laws of several States against the holding of lands by aliens? It would be a novelty in our judicial

[1] Fisher v. Fielding, 67 Conn. 91, 104.

[2] Second Employers' Liability Cases, 223 U. S. 1, 56.

practice, but law is a progressive science, and ought to be such as best answers the needs of the time.

As a general rule, it would certainly be unwise to put before a court the naked question of the unconstitutionality of a statute, in order to set at rest a political question. But in several States such jurisdiction in matters of special moment is given to the courts of last resort, or to their judges, on the application of a political department. In Massachusetts, for instance, the Constitution (Chap. III, Art. 1.) has provided ever since 1780 that "each branch of the legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions." Such a provision throws upon judges the duty of deciding an abstract question without the advantage of argument from counsel. The Spanish proverb says that he who has only heard one side of a controversy has heard nothing. Under the Massachusetts scheme the courts hear neither side.

The Act of Congress here suggested would bring adverse parties before the court and give every opportunity for full discussion. It might be instituted by petition, naming no parties defendants, like an admiralty libel *in rem*. The United States would represent the claims of the foreign government, if that did not appear. The State could and presumably would defend its own legislation. Any party interested might be admitted under an order of notice. If the decision should uphold the statute against the right claimed in behalf of the alien, the writ of error provided for by the JUDICIAL CODE would bring the cause promptly before the Supreme Court of the United States.

No foreign government could justly complain of the time that would be thus taken in disposing of its complaint. Every foreign government can now justly complain, if its citizens are discriminated against, while in this country, by State laws in violation of rights guaranteed by the United States.

For seventy years or more we have given a remedy by writ of error where a *nisi prius* court of the United States has misconstrued the Constitution, laws or treaties of the United States to the prejudice of a right claimed under them. We gave it in order to prevent the recurrence of such a situation as arose out of the capture of the CAROLINE in the course of a rebellion in Canada, by a Canadian force. In the affray incident to the occasion a citizen of New York was killed on the soil of New York. A Canadian was indicted by New York for the homicide. The British government demanded his release, and had it not been for his acquittal

on the ground of an *alibi,* war with Great Britain might have ensued.

There ought to be an orderly and a judicial method of settling such controversies, when diplomacy fails. The form of action suggested would accomplish that result with certainty and with justice.

Nor would it trench on any prerogative of the State. The care of our foreign relations rests exclusively with the United States. In the language of the Supreme Court of the United States, "The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized 'to define and punish * * * offences against the law of nations.' Art. I, sec. 8, clause 10. The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof." * * * "A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect. Consequently a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they owe to another nation, and which the law of nations has imposed upon them as part of their international obligations."[3]

The suggestion that the action, of the form above proposed, by the United States, should be brought in a court of the State is, of course, made with a view of avoiding unnecessary occasion for awaking any sentiment of State jealousy. Justice will generally be done in the first instance, or on appeal, by the highest State tribunal. The Supreme Court of a State is rarely at variance with the Supreme Court of the United States on questions of constitutional construction.

It would be more agreeable, no doubt, to foreign nations to have the right to ask that the suit should be prosecuted throughout in Federal courts; but they would have no just reason to find fault with our policy if we preferred to proceed, in the first instance, in a tribunal of the State.

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[3] United States v. Arjona, 120 U. S. 479, 483, 484, 487.